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July 29, 2014

Hon. Bob Goodlatte
Chair, Judiciary Committee
U.S. House of Representatives
2309 Rayburn HOB
Washington, D.C. 20515

Hon. Barbara Mikulski
Chair, Appropriations Committee
U.S. Senate
503 Hart Senate Office Building
Washington, DC 20510

Hon. Patrick Leahy
Chair, Judiciary Committee
U.S. Senate
437 Russell Senate Bldg
Washington, DC 20510

Hon. Harold Rogers
Chair, Appropriations Committee
U.S. House of Representatives
2406 Rayburn HOB
Washington, D.C. 20515

Re: H.R. 4936, the Vulnerable Immigrant Voice Act

Dear Representative Goodlatte, Senator Leahy, Senator Mikulski and Representative Rogers:

The New York City Bar Association (the “City Bar”) and its Committee on Immigration and Nationality Law (the “Committee”) write in support of H.R. 4936, the Vulnerable Immigrant Voice Act (VIVA), and Senator Mikulski’s proposed appropriations for appointment of counsel for children in removal proceedings. The City Bar and the Committee also urge Congress not to pass any provisions that would deny children from Central America access to full hearings as provided by the Trafficking Victims Protection Reauthorization Act.

The City Bar has a longstanding commitment to promoting the fair and effective administration of justice, including in the immigration system.¹ Our Committee has deep knowledge of issues affecting children in removal proceedings. Our Chair, Professor Lenni Benson, is the Director of New York Law School’s Safe Passage Project, which works with volunteer attorneys to provide *pro bono* representation to unaccompanied immigrant children. At least 16 of our committee members also work with children in removal proceedings.

In recent years, an epidemic of crime, gang threats, and violence has swept Guatemala, El Salvador, and Honduras, and this year tens of thousands of children have sought refuge in the

¹ See Association of the Bar of the City of New York, Committee on Immigration & Nationality Law, *Report on the Right to Counsel for Detained Individuals in Removal Proceedings* (Aug. 2009), available at www.nycbar.org/pdf/report/uploads/20071793-ReportontheRighttoCounsel.pdf.

United States.² In responding to this humanitarian crisis, Congress's top priority should be to protect vulnerable children.³ To accurately identify those children in need of protection and to comport with due process, Congress should ensure that all children are represented by counsel and that all children have access to full and fair hearings before neutral immigration judges.

Appointed Counsel for Children

Congress should provide for the appointment of counsel for children in immigration proceedings. As the New York Times has noted, "The Dickensian absurdity often seen in immigration courts – little children propped up before judges and government lawyers with no idea of what is going on – must not be tolerated."⁴

Access to counsel in removal proceedings reflects the fundamental American value of due process.⁵ According to a recent poll, 76 percent of registered voters, including 87 percent of Democrats and 67 percent of Republicans, support ensuring that "immigrants can have legal representation if they face deportation."⁶

A recent study found that nearly half of children in removal proceedings are currently unrepresented.⁷ The likelihood of winning protection was also much lower for children without lawyers: one in ten of these children won permission to stay in the United States, compared to 47 percent of those children appearing with counsel.⁸

Deporting children can have grave consequences. Criminal gangs have exerted increasingly brutal control over communities in Mexico, Guatemala, El Salvador, and Honduras, targeting children for torture, killings, rape, and other violence.⁹ In a recent study, the UNHCR

² Elizabeth Kennedy, *No Childhood Here: Why Central American Children are Fleeing Their Homes* (July 2014), <http://www.immigrationpolicy.org/perspectives/no-childhood-here-why-central-american-children-are-fleeing-their-homes>.

³ *Id.*

⁴ *Innocents at the Border: Immigrant Children Need Safety, Shelter and Lawyers* (Editorial), N.Y. TIMES, June 16, 2014.

⁵ American Immigration Council, *Two Systems of Justice: How the Immigration System Falls Short of American Ideals of Justice* 12 (Mar. 2013), available at www.immigrationpolicy.org/sites/default/files/docs/aic_twosystemsofjustice.pdf; Mark Noferi, *Cascading Constitutional Deprivation: The Right To Appointed Counsel For Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 119-20 (2012).

⁶ Belden Russonello Strategists LLC, *American attitudes on immigration reform, worker protections, due process and border enforcement* 3 (Apr. 2013), available at <http://cambio-us.org/wp-content/uploads/2013/04/BRS-Poll-for-CAMBIO-APRIL-16-2013-RELEASE.pdf>.

⁷ Transactional Records Access Clearinghouse, *New Data on Unaccompanied Children in Immigration Court*, July 15, 2014, <http://trac.syr.edu/immigration/reports/359/>.

⁸ *Id.*

⁹ See, e.g., Pamela Constable, *Could kids fleeing Central America be sent back to face more gang violence?*, WASH. POST, July 25, 2014; Kennedy, *supra* n. 2; U.N. High Commissioner for Refugees, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* 26-28 (Mar. 2014), www.washingtonpost.com/local/gang-member-deportations-in-90s-factor-in-border-crisis-some-contend/2014/07/25/10c5adda-0d1d-11e4-8341-b8072b1e7348_story.html.

found that at least 58 percent of children arriving from Mexico and Central America had been “forcibly displaced” because they faced violence or harm that signaled a potential need for international protection.¹⁰ This figure does not include many children who are eligible for lawful immigration status because of factors such as domestic abuse, neglect, or abandonment. The Safe Passage Project has found that nearly 90 percent of the children screened in New York are eligible for some type of immigration relief.¹¹

Children also face serious challenges in explaining their need for protection. As the National Association of Immigration Judges (NAIJ) recently wrote, in “the legal arena, it is universally accepted that children and juveniles are a vulnerable population with special needs.”¹² To understand a child’s history, “an atmosphere of trust must be established, and a rapport developed which assures that the minor is both emotionally able and psychologically willing to discuss issues which may be embarrassing, shameful, or traumatizing.”¹³ This process takes time and care, especially for a child who has experienced trauma.

The rules for determining whether a child is entitled to protection are exceedingly complicated. As Justice Alito has written, “nothing is ever simple with immigration law.”¹⁴ Children often must obtain decisions from state courts or other agencies before they can win permission from an immigration judge to stay in the United States.¹⁵ Without a lawyer, children do not know which facts are important to their cases, let alone how to argue legal points against trained government lawyers.¹⁶ Immigration judges have also voiced support for appointed counsel because they need assistance to accurately determine which children need protection from persecution, trafficking, or abuse.

Moreover, children who are represented are more likely to return to the court and complete immigration proceedings. Among hundreds of children represented by pro bono counsel through the Safe Passage Project, all but 3 appeared for their hearings.

Moreover, a recent report by Dr. John D. Montgomery of NERA Economic Consulting demonstrates that an appointed counsel program could be implemented at little or no cost to

¹⁰ UNHCR, *Children on the Run* at 6, 17.

¹¹ Lenni B. Benson & Claire R. Thomas, Letter to the Editor, *Lawyers for Immigrant Youths*, N.Y. Times, May 27, 2014, <http://nyti.ms/1gzS7S7>; see also Lenni B. Benson, Deborah Lee, & Lisa Frydman, *Helping Child Migrants: Learn How to Represent Children Who Need Immigration and Family Court Assistance*, Practicing Law Institute, recorded June 2014, www.pli.edu/Content/OnDemand/Helping_Child_Migrants_Learn_How_to_Represent/_N-4nZ1z129rs?fromsearch=false&ID=227276.

¹² Letter from Dana Leigh Marks, President, National Ass’n of Immigration Judges, July 22, 2014, at 1.

¹³ *Id.* at 2.

¹⁴ *Padilla*, 130 S. Ct. at 1490 (Alito, J., concurring). Judges have often compared immigration law to the tax code in complexity. *Castro O’Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1987).]

¹⁵ See, e.g., 8 U.S.C. §§ 1101(a)(27)(J); Olga Byrne & Elise Miller, *The Flow of Unaccompanied Children Through the Immigration System: A Resource for Practitioners, Policy Makers, and Researchers* 26 (2012), www.vera.org/sites/default/files/resources/downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf (explaining requirement of state court ruling in special immigrant juvenile status cases).

¹⁶ Detained children and children in foster care also face major practical barriers to obtaining the state court findings necessary to gain protection based on abuse or neglect.

taxpayers, in light of associated cost savings.¹⁷ Providing counsel to indigent non-citizens can reduce other government costs by: (1) preventing unnecessary court proceedings; (2) reducing the amount of time individuals spend in detention; and (3) relieving the burden of government support to disrupted families. A system of appointed counsel for all individuals in removal proceedings could save the government approximately as much money as it would cost, primarily because such a program would increase efficiency and decrease the amount of time individuals must be detained before their cases are completed.¹⁸ Although the report did not separately analyze fiscal impacts only for children,¹⁹ the analysis illustrates the likely cost efficiencies that counsel would produce.

For these reasons, Congress should provide appointed counsel to children in removal proceedings. The Administration has proposed \$2 million for a “justice AmeriCorps” program of *pro bono* lawyers. Organizations have called it a “step in the right direction,” but “not adequate to meet overwhelming need.”²⁰ The President’s more recent proposal to appropriate \$15 million in supplemental funding for counsel is likewise a positive but inadequate step. Congress should appropriate at least \$50 million for appointed counsel for children, as proposed by the supplemental appropriations bill sponsored by Senator Mikulski.²¹

Congress Should Provide Children with Full and Fair Immigration Hearings

Second, Congress should strive to improve the procedures used to screen all children at the border, not to make procedures more “equal” by denying due process to children from Central America. Under current law, Customs and Border Patrol officers may return unaccompanied children to Mexico after a very brief screening interview, without bringing them before an immigration judge.²² CBP officers are trained to patrol our borders, not to determine whether potentially traumatized children may qualify for legal protection or are equipped “to make an independent decision” not to seek protection.²³ In a recently leaked report, the UNHCR found that border patrol agents routinely do not explain to arriving children that they have a right to seek protection from an immigration judge as provided by law; rather, “CBP communicated to UNHCR that Mexican [unaccompanied children] are *always* returned to Mexico.”²⁴ Congress

¹⁷ John D. Montgomery, *Cost of Counsel in Immigration: Economic Analysis of Proposal Providing Public Counsel to Indigent Persons Subject to Immigration Removal Proceedings* 3 (2014), available at www.nera.com/nera-files/NERA_Immigration_Report_5.28.2014.pdf.

¹⁸ *Id.* at 3.

¹⁹ *Id.* at 3 n. 3.

²⁰ National Immigrant Justice Center, Statement, House Judiciary Committee, June 25, 2014, at 6 (“[J]ustice AmeriCorps is a step in the right direction, but given its modest size, geographic application to only 29 cities, limitation to children under the age of 16, and the time it will take to get the program operational, the overwhelming need for legal services for unaccompanied immigrant children remains.”).

²¹ Senator Barbara Mikulski, *Chairwoman Mikulski Releases Summary of Emergency Supplemental Funding Bill* (July 23, 2014), <http://www.appropriations.senate.gov/news/chairwoman-mikulski-releases-summary-emergency-supplemental-funding-bill>.

²² TVPRA, 8 U.S.C. § 1232(a)(2).

²³ *Id.* § 1232(a)(2)(A).

²⁴ UNHCR, Findings and Recommendations Relating to the 2012-2013 Missions to Monitor the Protection Screening of Mexican Unaccompanied Children Along the U.S.-Mexico Border 5 (2014).

should require that all children, regardless of their origin, receive a fair hearing before an immigration judge.

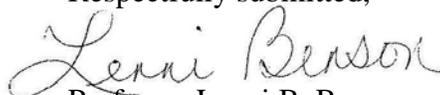
The “expedited removal” procedure that Representative Cuellar and Senator Cornyn have proposed for children who pass a screening by Border Patrol agents would also fall short of due process. This procedure imposes unworkable time limits on immigration judges, such as requiring that they hold a final hearing within 7 days of the initial screening and issue a decision no more than 72 hours after the hearing.²⁵ This timeframe is unreasonably short for any proceeding in which an individual bears the high burden of proving a likelihood of winning protection, let alone a proceeding against a recently arrived child who is unrepresented and may be suffering from trauma.²⁶ Were this provision passed, children would likely be returned in error to life-threatening situations.

Likewise, the bill introduced by Representative Cuellar and Senator Cornyn would deny due process to children by limiting administrative and judicial review.²⁷

Conclusion

The City Bar and the Committee believe that recognizing a right to appointed counsel and immigration hearings for children would ensure due process in a cost-effective manner, and that due process requires that children receive full and fair immigration hearings. The City Bar respectfully urges Congress to pass VIVA (H.R. 4936) and to appropriate sufficient funding for appointment of counsel to all children in removal proceedings. The City Bar also respectfully urges Congress not to roll back the protections established by the Trafficking Victims Protection Reauthorization Act.

Respectfully submitted,



Professor Lenni B. Benson
Chair, Immigration and Nationality Committee

Michael D. Cooper and Farrin R. Anello
Co-Chairs, Subcommittee on the Right to Counsel
and Due Process for Migrants

Cc: Members of the House Appropriations Committee
Members of the House Judiciary Committee
Members of the Senate Appropriations Committee
Members of the Senate Judiciary Committee

²⁵ HUMANE Act § 102.

²⁶ *Id.* § 102(a)(1).

²⁷ *Id.* §§ 102(a)(1), (b).